

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DEANA POLK,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. LA-CE-1180-H

PERB Decision No. 2365-H

April 8, 2014

Appearance: Deana Polk, on her own behalf.

Before Huguenin, Winslow and Banks, Members.

DECISION¹

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Deana Polk (Polk) from the dismissal (attached) of her unfair practice charge. The charge, as amended, alleged that the Regents of the University of California discriminated against Polk because of her exercise of protected employee rights, interfered with Polk's rights to use or participate in grievance proceedings, interfered with the rights of an employee organization, and failed and refused to engage in meeting and conferring with Polk's exclusive representative, in violation of Higher Education Employer-Employee Relations Act (HEERA)² section 3571, subdivisions (a), (b) and (c). Polk asserts that the University violated HEERA by: (1) failing to return communications to Polk's union steward;

¹ PERB Regulation 32320(d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

² HEERA is codified at Government Code section 3560 et seq.

(2) improperly retrieving voice-mail messages intended for Polk; and (3) denying Polk the opportunity to advance to “career” status.

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions raised by Polk’s appeal. Based on this review, the Board concludes that the Office of the General Counsel’s warning and dismissal letters are supported by the factual allegations included in the unfair practice charge, as amended. The Board also concludes that the warning and dismissal letters are well-reasoned and in accordance with applicable law, and that Polk’s appeal raises no issues warranting further consideration from the Board. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge, as amended, in Case No. LA-CE-1180-H is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2807
Fax: (818) 551-2820



November 6, 2013

Deana Polk

Re: *Deana Polk v. Regents of the University of California*
Unfair Practice Charge No. LA-CE-1180-H
DISMISSAL LETTER

Dear Ms. Polk:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 17, 2013. Deana Polk (Polk or Charging Party) alleges that the Regents of the University of California (UC or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)¹ by: (1) failing to return the communications of her union steward; (2) improperly retrieving voice-mail messages intended for her; and (3) denying her the opportunity to advance to "Career" status.

Charging Party was informed in the attached Warning Letter dated August 19, 2013, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it on or before August 26, 2013, the charge would be dismissed. Charging Party requested, and the undersigned granted, an extension until September 24, 2013, for Charging Party to file a Second Amended Charge. On September 24, 2013, Charging Party filed a Second Amended Charge.

Additional Facts as Alleged²

The collective bargaining agreement (CBA) between the UC and Teamsters Local 2010 provides that laid-off employees are eligible for preferential consideration for rehire provided they are fully qualified to perform the duties of the new position. It also provides that employees who are preferentially rehired and who fail to perform satisfactorily may, at any

¹ HEERA is codified at Government Code section 3560 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

² Respondent filed a position statement on October 9, 2013. A Board agent may rely on a respondent's factual allegations that are undisputed or not refuted by the charging party. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

time within six months following their rehire, be returned to layoff with restoration of full preferential rehire status.

In July 2011, Charging Party was served with notice that she would be laid off from her position in the Early Academic Outreach Program, effective September 13, 2011. On September 1, 2011, she was appointed to a position with the Student Recreation Center as a preferential rehire under the CBA. On January 18, 2012, Charging Party was released from her position with the Student Recreation Center based on an alleged failure to perform satisfactorily. Accordingly, per the CBA, she was returned to layoff status with full preferential rehire rights.

Charging Party alleges that on several different occasions she was advised by representatives of her union that the UC would retaliate against her if she filed a grievance. In December 2008, Chris Benoit, a union steward, told Charging Party that if she filed a grievance challenging the UC's failure to advance her to career status, the UC would retaliate against her by laying her off. In late 2011, Charging Party contacted Kixion Obioma Sakhu, a union steward, about her concerns regarding the work environment at the Student Recreation Center. Sakhu advised her that it was not a good idea to file a grievance because it could subject her to release pursuant to the CBA provision that allows the UC to summarily release preferential rehires during the first six months of their reappointment period. In October 2012,³ Gregorial Daniels, another union steward, communicated to Charging Party that it was not a good idea to file a grievance against the UC while on "at-will status" because it could lead to her release.

Discussion

1. Statute of Limitations

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) The charge was filed on January 17, 2013. Therefore, to be timely, any allegations of unlawful conduct must have occurred on or after July 17, 2012.

³ The Second Amended Charge states that the conversation with Daniels occurred in October 2013. However, as this date post-dates the filing date of the Second Amended Charge, it is presumed to be a typographical error.

Here, Charging Party was released from her position at the Student Recreation Center on January 18, 2012. Therefore, even assuming the allegations regarding her release relate back to the original charge,⁴ they are well outside the six month limitations period.

Charging Party asserts that her charge is timely because she did not become aware that the release constituted an unfair practice until August 2012. However, the Board has held that a charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (*Empire Union School District* (2004) PERB Decision No. 1650.)

Charging Party also asserts that her charge should be deemed timely because the statute of limitations was tolled while she pursued a grievance challenging her release. The Board has held that the statute of limitations may be tolled during the time it takes to exhaust the contractual grievance machinery through settlement or binding arbitration, provided the same issue is before the arbitrator as is raised in the unfair practice charge. (*Oxnard Elementary School District* (2004) PERB Decision No. 1728.) Here, it is unclear whether Charging Party or her representative filed a grievance to challenge her release from her position with the Student Recreation Center. Although the Second Amended Charge states that Charging Party contacted her union representative to file a grievance within 30 days of being released, it does not state that a grievance was ever filed. It is also unclear whether, assuming a grievance was filed, it was based on the same underlying conduct as is alleged in the instant unfair practice charge. Accordingly, there are insufficient facts to support Charging Party's assertion that the statute of limitations should have been tolled.

Based on the above, the allegations in the Second Amended Charge are untimely and will be dismissed on that basis.

2. Discrimination/Retaliation

The Second Amended Charge alleges that Charging Party's release from her position with the Student Recreation Center was discriminatory. Even assuming these allegations are timely, the Second Amended Charge does not state sufficient facts to establish a prima facie case for discrimination/retaliation. To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the

⁴ The statute of limitations for new allegations contained in an amended charge begins to run based on the filing date of the amended charge, unless the new allegations in the amended charge relate back to the original allegations in the initial charge. (*County of Santa Barbara* (2012) PERB Decision No. 2279-M.) An amended charge relates back to the initial charge only when it clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Ibid.*)

employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Here, Charging Party has established that the UC took adverse action against her by releasing her from her position at the Student Recreation Center. However, the charge does not state how Charging Party exercised rights guaranteed to her by HEERA or whether the UC had knowledge of the exercise of those rights. In addition, there are insufficient facts to show any nexus between Charging Party's release and any protected activity. Charging Party alleges that she was advised by several union representatives that the UC retaliates against employees who file grievances. However, there are no facts to show that the statements of these union representatives accurately reflects how the UC responds to grievances. Even assuming her

union representative's statements are accurate, as mentioned above, there are no facts to show that a grievance was ever filed on Charging Party's behalf. In fact, the charge appears to indicate that, based on the advice of her union representatives, Charging Party never filed a grievance.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth here and in the August 19, 2013 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document

may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Kent Morizawa
Regional Attorney

Attachment

cc: Shondella M. Reed
Jadie Lee

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
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August 19, 2013

Deana Polk

Re: *Deana Polk v. Regents of the University of California*
Unfair Practice Charge No. LA-CE-1180-H

WARNING LETTER

Dear Ms. Polk:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 17, 2013. Deana Polk (Polk of Charging Party) alleges that the Regents of the University of California (UC or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)¹ by: (1) failing to return the communications of her union steward; (2) improperly retrieving voice-mail messages intended for her; and (3) denying her the opportunity to advance to "Career" status.

Facts as Alleged

The charge states:

Per the directive of Gregorial Daniels (Teamsters Local 911 Stuart [sic]), I write to initiate a grievance against University of California, Riverside whereby UCR failed to negotiate in good faith and engaged in unfair practices, causing an obstruction of my rights to engage in grievance and disciplinary proceedings.

UCR Labor Relations refused to return communications of Kixion Obioma Sakhu.

Per Kixion, UCR Labor Relations refused to return Kixion Obioma Sakhu's (Teamsters Clerical 2010 Stuart [sic]) communications which inhibited his ability to gain the appropriate background information to proceed with my concerns.

¹ HEERA is codified at Government Code section 3560 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

An EAOP staff member was in violation of confidential communications between a Teamsters Clerical Stuart [sic] and the client

Per Chris Benoit's accounts, an EAOP staff member failed to deliver phone messages to me as they retrieved them from the UCR voicemail system as well as continuing to listen to the messages while refusing to notify the sender (Chris Benoit) that the messages were not being delivered. They also failed to notify me that the aforementioned messages existed.

The University failed to advance me from Limited to Career employee after I completed 1500 hours.

I was denied the opportunity to advance to UCR Career status after I worked 1500 hours.

(Emphasis in original.)

Discussion

1. Charging Party's Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." To do so, the charging party should include sufficient facts to describe the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

The charge consists of three allegations: (1) the UC failed to return the communications of Charging Party's union steward; (2) an EAOP staff member improperly retrieved voice-mail messages intended for Charging Party; and (3) Charging Party was denied the opportunity to advance to Career status. However, the charge does not provide dates for when each of these

alleged unfair practices occurred. Accordingly, as a threshold matter, Charging Party has not met her burden of proof that any of the allegations in the charge occurred within six months of the filing of the charge. Thus, without additional information, the entire charge will be dismissed on that basis.

2. Negotiations in Bad Faith

The charge alleges, as a general matter, that the UC “failed to negotiate in good faith.” Individual employees do not have standing to allege unilateral change violations (*Oxnard School District (Gorcey/Tripp)* (1988) PERB Decision No. 667), nor allege violations of sections which protect the collective bargaining rights of employee organizations. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) Here, Polk is the only charging party identified on the charge form. She does not demonstrate that the UC has a duty to negotiate in good faith with her as an individual employee or that she has standing to raise this claim on behalf of her union. Accordingly, this allegation does not state a prima facie case.

3. Interference

The charge alleges that the UC’s conduct caused “an obstruction of [Charging Party’s] rights to engage in grievance and disciplinary proceedings.” The test for whether a respondent has interfered with the rights of employees under the HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent’s conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

a. Kixion Obioma Sakhu’s Communications to the UC

The charge does not allege sufficient facts to show that UC’s conduct vis-à-vis Kixion Obioma Sakhu (Sakhu) implicated Charging Party’s rights as an employee under HEERA. It is unclear what “background information” Sakhu sought from the UC or the nature of Charging Party’s “concerns.” In addition, to the extent that these allegations implicate the UC’s duty to comply with information requests from Teamsters Clerical 2010, Charging Party does not have

standing to pursue these claims as an individual. (*City of Santa Monica* (2012) PERB Decision No. 2246-M.) Thus, even assuming these allegations are timely, they will be dismissed.

b. Retrieval of Voice-mail Messages by EAOP Staff Member

In order for the EAOP staff member's conduct to constitute an unfair practice on the part of the UC, Charging Party must establish that he or she is an agent of the UC. PERB applies common law principles to determine the existence of agency. (*Inglewood Unified School District* (1990) PERB Decision No. 792, *affd. Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767.) The burden of proof is on the party asserting the existence of agency. (*Ibid.*) The charging party must prove the agency by actual or apparent authority by establishing representation by the principal of the agency, justifiable reliance by the charging party on that representation, and a change in position by the charging party as a result of the agency. (*Ibid.*)

Here, the charge does not allege any facts to show that an EAOP staff member is an agent of the UC. However, even assuming that person is an agent of the UC, the charge does not show that the retrieval of voicemails implicated Charging Party's rights as an employee under HEERA. The charge does not state the content of the voice-mail messages or otherwise indicate how they related to Charging Party's engagement in protected activities. Thus, these allegations will be dismissed.

c. Denial of Advancement to Career Status

The charge does not allege sufficient facts to show that the denial of Charging Party's opportunity to advance to Career status implicated her rights as an employee under HEERA. There are no facts to establish whether any policies exist that set forth when the UC must advance an employee to Career status and how Charging Party's denial of advancement violated these policies. Thus, even assuming these allegations are timely, they will be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case.² If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case

² In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **August 26, 2013**,³ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kent Morizawa
Regional Attorney

KM

³ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)